Supreme Court, U.S.
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No. 97-220

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,
*Petitioner,*

v.

CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Petitioner herewith submits its Reply to Respondents' Brief in Opposition, as follows:

### I. CONTRARY TO RESPONDENTS' ASSERTION, THIS COURT'S RECENT DECISION IN *CAMPS NEWFOUND/OWATONNA, INC. v. TOWN OF HARRISON, ME.*, 117 S.Ct. 1590 (1997), IS MATERIAL TO THIS CASE.

After accusing Petitioner of asserting that *Camps* changes the standard of review (p. 3), which it most assuredly does not, Respondents proceeded to cite *Camps* for the dubious proposition that "[t]he standards of review applicable to facially discriminatory and facially neutral legislation are substantially different" (p. 4). Respondents' position stands Commerce Clause jurisprudence on its head. Since 1979, this Court has consistently acknowledged that facially neutral legislation which nevertheless discriminates *in its practical effect* is reviewed under strict scrutiny. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). That this Court does not focus exclusively on the language of the challenged statute in determining whether the statute discriminates is further evidenced by this Court's recent definition of actionable discrimination: "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, etc*, 511 U.S. 93, 99 (1994). On this point, Respondents are simply wrong.

*Camps* is material, not because it *changes* the standard of review but because it reinforces the mandate for lower courts to view skeptically any incidence of discrimination without taking into account the overall impact on the national economy. The district court in this case openly questioned whether the zoning practices of a small Texas town present grave implications for the

national economy.[1] *Camps* makes clear that the analysis adopted by the district court was philosophically misguided because the Dormant Commerce Clause concerns itself, not with the nation's economy *per se* but with national solidarity.[2] *Camps* represents the first modern pronouncement from this Court on this critical point.[3] Had the district court allowed itself to assume that a local ordinance which discriminates against the interstate commerce in HUD-code manufactured housing is to be reviewed under the same exacting standard as, say, a state statute that discriminates against interstate commerce, then it is probable that the outcome of this case would have been markedly different.

*Camps* is also material to this case because it clarifies the burden borne by the challenger. *Camps* holds that the challenger is not required to prove that, in fact, discrimination caused an actual shift in business from interstate commerce to an intrastate industry. 117 S.Ct. at 1601 n.15. In the context of this case, Petitioner should not have been required to show—but *was* required to show—that, in fact, a prospective purchaser of a HUD-code manufactured home had instead chosen a modular home as a result of La Porte's prohibition against the

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[1] District Judge Atlas doubted whether there was an "identifiable and statistically significant impact on interstate commerce resulting from the prohibition of manufactured homes from a segment of a single city, La Porte." (App. C, 22a).

[2] In *Camps*, this Court held that "even the smallest scale discrimination can interfere with the project of our federal Union," 117 S.Ct. at 1608, and that "there is no 'de minimis' defense to [discrimination]," *id.* at 1601 n.15.

[3] In *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994), Justice Kennedy described the national purposes served by the rule against discrimination, *id.* at 390, but there was no broad pronouncement, as there is in *Camps*, that *any* level of discrimination violates those purposes.

former.[4] If the district court and Fifth Circuit had the opportunity to follow *Camps,* the outcome would probably be significantly different, thus demonstrating the virtue of a GVR order.

## II. CONTRARY TO RESPONDENTS' ASSERTION, HUD'S STATEMENT OF POLICY 1997-1, RELEASED MAY 5, 1997, IS MATERIAL TO THIS CASE.

Respondents err when they state, at 4, that "[t]he HUD policy is not material to Petitioner's preemption claim because HUD's position on preemption is consistent with the analysis of that issue by the Fifth Circuit." On the contrary, the Fifth Circuit has explicitly rejected the substance of what is now contained in HUD's Statement of Policy 1997-1.

The gist of HUD's Statement of Policy 1997-1 can be stated thusly: if two different factory-built houses meet the federal definition of "manufactured home," then a municipality cannot accord differential treatment to the houses.[5] At the district court and Fifth Circuit, Petitioner consistently argued that, because a modular home can meet the federal definition of "manufactured home," and

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[4] In *Texas Manufactured Housing Association, Inc., et al. vs. City of Nederland, et al.,* 101 F.3d 1095 (5th Cir. 1996), *cert. denied,* 117 S.Ct. 2497 (1997), upon which, as Respondents point out, the decision in this case was based, the Fifth Circuit found that Petitioner had failed to prove that would-be buyers of HUD-code manufactured housing would turn instead to modular housing, an intrastate industry. 101 F.3d at 1104.

[5] HUD's Guidelines provide that "a locality cannot accept structures meeting the Federal definition of manufactured home[] which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards" (App. E, 61a). On the other hand, "[i]f under the local zoning laws the locality accords the same treatment to all structures that meet the Act's definition of a "Manufactured home" (42 U.S.C. 5402(6)), the locality is not in conflict with the preemptive provisions of the Act" (App. E, 70a) (Statement of Policy 1997-1).

because La Porte treats modular housing differently from HUD-code manufactured housing, La Porte is effectively imposing a different building code (*i.e.*, the Texas modular building code) on HUD-code manufactured housing in violation of 42 U.S.C. § 5403(d). Petitioner's longstanding position mirrors HUD's recent Statement of Policy, which provides that "[b]y excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards" (App. E, 70a).

Contrary to Respondents' assertion, both the district court and the Fifth Circuit have previously rejected Petitioner's and, therefore, HUD's position. The district court found that, "rather than establish construction or safety standards for manufactured homes, La Porte has excluded manufactured homes from its 'R-1' districts" (App. C, 9a). The Fifth Circuit's position is that Petitioner is required to show that the exclusion of HUD-code manufactured homes is "linked" to local safety and construction standards.[6]

HUD's Guidelines and Statement of Policy are material to this case. If modular housing meets the federal definition of "manufactured home," then, because it treats modular housing (permitted) differently from HUD-code manufactured housing (excluded in R-1 districts), La Porte's zoning scheme violates 42 U.S.C. § 5403(d). Respondents' ready response at the Fifth Circuit [7] was that a modular home allegedly does not meet the federal definition of "manufactured home," which is required to be built on a permanent chassis. 42 U.S.C. § 5402(6).

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[6] *See Texas Manufactured Housing Association, Inc., et al. vs. City of Nederland, et al.*, 101 F.3d 1095, 1100 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2497 (1997).

[7] *See* Brief of Appellees, at 11.

In reality, however, many *modular* homes are also constructed with a permanent chassis.[8] These particular homes —which meet the federal definition of "manufactured home" but are constructed to the Texas modular building code—are allowed in La Porte's R-1 districts, but HUD-code manufactured homes are not. This zoning scheme violates 42 U.S.C. § 5403(d).

Respondents' final argument, at 5-6, is that HUD's Guidelines and Statement of Policy are not material to this case because they are not "binding" on the courts. Respondents' loose assertion is troublesome because, although "[t]he judiciary is the final authority on issues of statutory construction," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 843 n.9 (1984), this Court has held that courts "must sustain the [agency's] approach so long as it is 'based on a permissible construction of the statute.'" *Auer v. Robbins*, 117 S.Ct. 905, 909 (1997) (quoting *Chevron*, 476 U.S. at 842-43). Lower courts would be bound by HUD's Guidelines and Statement of Policy unless they are found to be "contrary to clear congressional intent." *Chevron*, 476 U.S. at 843 n.9. If the District Court and Fifth Circuit had the opportunity to follow HUD's lead in this case, the outcome would probably be significantly different, demonstrating once again the virtue of a GVR order.

## III. CONTRARY TO RESPONDENTS' ASSERTION, THIS CASE IS NOT "SUBSTANTIALLY IDENTICAL" TO THE *NEDERLAND* CASE.

Respondents place too much reliance upon the fact that certiorari was denied in *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2497

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[8] As amici point out in their brief (p. 11), fourteen companies across the country produce modular housing with a permanent chassis.

(1997).[9] When Petitioner filed its petition for certiorari in the *Nederland* case (April 25, 1997), HUD had not yet published its Statement of Policy 1997-1 (May 5, 1997), and this Court had not yet handed down its decision in *Camps* (May 19, 1997), so the focus of that petition was necessarily different than the petition filed in this case.

The facts in this case also serve to distinguish the two cases. The evidentiary record in this case is stronger than in the *Nederland* case because it is vastly more objective. On the Dormant Commerce Clause claim, the Fifth Circuit in the *Nederland* case refused to compare the market for HUD-code manufactured housing with the market for modular housing, arguing that the two types of housing were not substitutes for one another. *Nederland*, 101 F.3d at 1104. On this point, Petitioner's evidence in the *Nederland* case consisted of affidavits from interested persons. In this case, however, La Porte's Chief Building Official sent a letter to a former plaintiff in this case in which he wrote that she would be permitted to replace her fire-damaged HUD-code manufactured home with a modular home.[10] He also described a modular home as a "type of manufactured home."[11] This type of damning evidence was not available in the *Nederland* case.

The *Nederland* case is also distinguishable with respect to Petitioner's federal preemption claim. In *Nederland*, the Fifth Circuit found that Petitioner did not prove that Nederland's exclusion of HUD-code manufactured homes

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[9] This Court has repeatedly cautioned that "an order denying a petition for certiorari expresses no opinion on the merits of the case." *Carpenter v. Gomez*, 116 S.Ct. 488 (1996) (memorandum of Stevens, J., respecting the denial of certiorari).

[10] Letter, Mark S. Lewis to Janet A. Stevenson, October 6, 1993 (reproduced as Appendix G-1 to the brief of amici curiae).

[11] *Id.*

was "linked" to the fact that HUD-code homes do not meet the local building code. *Nederland*, 101 F.3d at 1100. In this case, however, there is tangible evidence of "linkage" because of "position statements" made by La Porte officials. During the discovery phase of this lawsuit, La Porte's officials were asked to acknowledge that HUD-code manufactured homes are as safe as modular homes. Rather than take a neutral stance, La Porte proclaimed that modular homes are "constructed to meet more stringent safety requirements than are HUD-code homes." [12] This type of evidence, not present in the *Nederland* case, supports the notion that La Porte is promoting safety by regulating land use, the effect of which is to force manufactured housing either to meet safety standards which are different from those prescribed by the HUD code (thereby violating 42 U.S.C. § 5403(d)), or suffer exclusion.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted. Alternatively, this Court should issue a GVR order.

Respectfully submitted,

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[12] *See* Respondents' answer to Interrogatory No. 16 (Exhibit M to Petitioner's Response in Opposition to Respondents' Motion for Summary Judgment).